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No. 71-71

In the Supreme Court of the United States

OCTOBER TERM, 1971

JACK MATALON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Following a jury trial in the United States District Court for the Southern District of New York, petitioner was found guilty of conspiracy and one substantive count of inducing one Norman Allen to travel in interstate commerce in furtherance of a scheme to defraud him, in violation of 18 U.S.C. 2314.[1] He was sentenced to concurrent one year prison terms. The court of appeals affirmed (Pet. App. A).

[1] Of the three others charged in the indictment, one, Rosenberg, died prior to trial. Daskal pleaded guilty to the conspiracy count and testified on behalf of the government. Betesh was tried with petitioner and found guilty on two counts. He was placed on probation for one year and did not appeal.

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1. The evidence, which petitioner does not contest, is recounted in some detail in the opinion of the court below (Pet. App. A 3a–8a). On March 8, 1963, Allen, an importer and distributor of merchandise in Detroit, met Robert Rosenberg and agreed to purchase for $23,375 a quantity of radios to be supplied by Ralph Betesh. A week later, Allen traveled to New York, where he conferred with Rosenberg and Betesh. After a series of meetings, they agreed to a new order and Allen paid Rosenberg approximately $26,000.

On March 19, 1963, Rosenberg arranged for Andor Daskal and petitioner to rent a truck and pick up the radios at a warehouse where they were being stored. In the truck en route, Rosenberg attempted to sell the radios to Daskal. Daskal refused after learning they belonged to Allen, despite petitioner's urgings that he do so. Rosenberg later sold the radios to others and gave Daskal and petitioner $2,000 or $2,500 for their help.

Rosenberg, faced with persistent inquiries from Allen, instructed petitioner and Daskal to help keep Allen calm. Shortly thereafter, petitioner told Allen that he knew nothing about the radios, and a week later assured him that the radios were being packed at the warehouse. Allen never received the shipment, nor was his money returned.

At trial, the government presented testimony from Allen and Daskal, as well as all relevant documents. Petitioner's counsel did not present any direct evidence, but instead called seven character witnesses, consisting of six members of the business community and a rabbi. Each testified that petitioner enjoyed an

excellent reputation and was actively engaged in charitable activity (*e.g.*, 34A, 38A),[2] but on cross-examination admitted that he did not know of several prior convictions, a court-martial, and two indictments then pending against petitioner for smuggling and possession of stolen goods (*e.g.*, 34A–36A). Petitioner took the stand to explain the facts surrounding each charge against him. His attorney questioned him about the pending indictments, but was stopped by the trial judge, who asked if petitioner had been advised of his constitutional rights. After counsel and petitioner assured the judge that petitioner was aware of his rights, the judge allowed the inquiry to proceed (70A–81A).

2. Petitioner's only contention in this Court is that he was denied effective assistance of counsel. He bases this claim on asserted mistakes by his retained counsel in calling the reputation witnesses, despite the rule of *Michelson* v. *United States*, 335 U.S. 469, permitting cross-examination of such witnesses on their knowledge of a defendant's criminal record, and in questioning petitioner about the pending indictments without informing him of his right against self-incrimination. The first criticism was thoroughly discussed and rejected in the opinion of the court below, on which we rely here (Pet. App. A 8a–11a). With regard to his second claim, we note that petitioner testified at trial that he had been fully advised by counsel of his rights (70A), and recanted that testimony only when the attorney representing him in one of the pending cases

[2] "A" refers to Appellant's Appendix in the court of appeals, a copy of which we are lodging with the clerk.

complained of petitioner's remarks (93A–95A). Moreover, the court below found it "arguable" that petitioner's testimony "tended to mitigate rather than exacerbate the effect of the cross-examination of the reputation witnesses" (Pet. App. A 8a), so that counsel's decision on this score probably helped petitioner.

Petitioner's counsel was faced with strong evidence of guilt, supplied largely through the testimony of petitioner's co-conspirator (Daskal) and the victim of the fraud. In these circumstances, he cannot be faulted for trying, albeit unsuccessfully, to depict his client as a respected member of the community and to overcome the effects of the resulting cross-examination by having petitioner explain, in exonerative terms, his criminal record. The court below correctly concluded on this record that petitioner received adequate representation. Compare *United States* v. *Katz*, 425 F. 2d 928 (C.A. 2), with *United States* v. *Hammonds*, 425 F. 2d 597 (C.A. D.C.).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERVIN N. GRISWOLD,
Solicitor General.

AUGUST 1971.

Petitioner suggests (Pet. 15) that district courts should have discretion to prohibit questioning character witnesses about remote or insignificant arrests or convictions. District courts already possess that power. *Michelson* v. *United States*, 335 U.S. 469, 484. In this case, since the character witnesses testified that they had known petitioner a long while, the trial judge manifestly did not abuse his discretion by permitting the prosecutor to inquire into their knowledge of criminal charges against petitioner remote in time but relevant to how well they knew him.

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